PUBLIC BANK BHD

v.

MOHD ISA MOHD NAFIDAH

HIGH COURT MALAYA, KUALA LUMPUR
MOHD ZAWAWI SALLEH J
[SUIT NO: D4-22A-442-2006]
23 OCTOBER 2012

CIVIL PROCEDURE: *Summary judgment - Application for - Final judgment for amount due and owing under al-bai bithaman ajil ('BBA') facility - Sale and purchase and construction agreement of property executed - Defendant sold property to plaintiff to facilitate BBA transaction - House under construction - Whether BBA facility agreements void under Islamic principle of contract - Whether house fit as security for facility - Rules of the High Court 1980, O. 14*

This was an application for summary judgment under O. 14 of the Rules of the High Court 1980 wherein the plaintiff was seeking final judgment against the defendant, *inter alia*, for an amount due and owing to the plaintiff in the sum of RM406,959.92. The defendant defended the action filed by the plaintiff and opposed this application. When Syahira Development Sdn Bhd ('the developer') confirmed that the defendant had paid the booking fee for a property, the plaintiff, a bank, offered RM217,887 *al-bai bithaman ajil* facility ('BBA facility') to the defendant to acquire the property from the developer. On 8 August 2003, the defendant executed a sale and purchase agreement of the property with the developer and the owners at RM128,430 ('S&P agreement') and construction agreement with the developer in respect of the same property at RM113,220 ('construction agreement'). On 11 August 2003, the defendant accepted the bank's offer for the BBA facility. In order to facilitate the BBA transaction, the plaintiff and the defendant executed the property purchase agreement ('PPA') where the defendant sold the property to the plaintiff at RM217,887.00 ('the purchase price') and sale agreement cum assignment ('SACA') wherein the plaintiff sold the same property back to the defendant at RM434,328.57 ('the selling price'), payable on deferred basis. The cause of action against the defendant was based on the alleged due selling price. A judgment in default of appearance ('JID') was entered against the defendant. However, it was set aside by the learned Senior Assistant Registrar *via* an application by the defendant. Hence, the present

application. Learned counsel for the defendant contended that the BBA facility agreements were void under the principle of Islamic contract as the subject matter, a house-still-pending completion, did not exist at the time of the conclusion of contract. He further contended that the subject matter was not fit to be used as a security for the facility granted because the defendant had not obtained a full ownership (*milk ghair al-tam*) of the property.

Held (allowing application):

(1) The issues raised by the defendant were not triable issues which warranted a full blown trial. (para 26)

(2) Malaysian scholars have permitted the sale of an asset under construction using BBA and/or *Bai Al-Inah*, because it is perceived as the sale of rights on the house under construction, not the sale of the physical house under construction. Rights are acknowledged as property in Islam according to majority of scholars, and hence the customers can sell the independent financial rights. (para 14)

(3) If the non-existent subject matter is certain in its existence and is capable of delivery in the future, it does not tantamount to *gharar al-fahish*. Shariah recognises beneficial ownership over a property or an asset. (para 18)

(4) By signing the SACA, the plaintiff had in fact assigned back to the defendant the property and the full and entire benefit of the S&P agreement. The defendant had also agreed not to hold the plaintiff liable for any loss or damages whatsoever incurred by him in the event of any delay in the delivery of vacant possession of the property. This was due to the fact that the defendant had accepted the property while it was under construction on the date of the execution of SACA. This condition should be given effect to. (para 25)

Case(s) referred to:

Bank Islam Malaysia Bhd v. Lim Kok Hoe & Anor And Other Appeals [2009] 6 CLJ 22 CA ***(refd)***

Chang Yun Tai & Ors v. HSBC Bank (M) Bhd & Other Appeals [2011] 7 CLJ 909 FC ***(refd)***

Mohd Alias Ibrahim v. RHB Bank Bhd & Anor [2011] 4 CLJ 654 HC ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 14

Other source(s) referred to:

Al-Kasani, *Badai Al-Sanai*, vol 5, p 171

Engku Ali, ERA (2009), *Islamic House Financing: Issues & Solution, In Prosiding Muzakarah Penasihat Syariah Kewangan Islam*, pp 21-27

Nuarrual Hilal Md Dahlan & Sharifah Zubaidah Syed Abdul Kader Aljunid, *Shariah and Legal Issues In House Buying in Malaysia: The Legality of Bay Bithaman-Al-Ajil ("BBA") With Special Reference To Abandoned Housing Projects*, pp 349-361

Zaharuddin Abd Rahman, *Contracts & The Products of Islamic Banking, CERT*, p 117

For the plaintiff - Nor Suhaina Sulaiman; M/s Chew Kar Meng, Zahardin & Partners

For the defendant - Mohd Hairani Samsi; M/s M Hairani & Assocs

Reported by Najib Tamby

JUDGMENT

Mohd Zawawi Salleh J:

Introduction

[1] Enclosure 19 is an application for summary judgment under O. 14 of the Rules of the High Court 1980 wherein the plaintiff seeks final judgment against the defendant for the sum of RM406,959.92, being the amount due and owing to the plaintiff as at 12 October 2006, costs and any other necessary relief.

[2] The defendant had defended the action filed by the plaintiff and opposed this application.

[3] After hearing the rival submissions, this court had, on 20 September 2012, granted the application with costs fixed at RM2,000.

Factual Background

[4] The relevant facts are as follows:

(a) The plaintiff is a bank and carries on its business at the Second Floor, 64 & 66, Jalan Tapah, Off Jalan Goh Hock Huat, 41400 Kelang, Selangor.

(b) The defendant was, at the material times, the plaintiff's customer in respect of one *Al Bai Bithaman Ajil* facility granted to him.

(c) The chronologies of events pertaining to the facility are as follows:

7 July 2003: Syahira Development Sdn Bhd ("the developer") issued a letter to the plaintiff and other financiers confirming that the defendant had confirmed booking and had paid booking fee for a property known as a single storey bungalow house situated at Plot No.11, Desa Kebun Indah, Klang, Selangor Darul Ehsan, constructed on a piece of land held under HS(M) 11084, Lot No. 4060, Tempat Kampong Jalan Kebun, Mukim of Klang, State of Selangor Darul Ehsan ("the property").

6 August 2003: The plaintiff had offered RM217,887 *Al Bai Bithaman Ajil* facility ("BBA facility") to the defendant *via* letter of offer dated 6 August 2003 to acquire the property from the developer ("the offer"). At this juncture, the defendant had not signed any sale and purchase agreement with the developer.

8 August 2003: It was only on this date, the defendant executed the following two agreements:

(a) Sale and purchase agreement with the developer and Raminah binti Thaman and Salehan bin Rahmad ("the owners") in respect of the property at RM128,430 ("S&P agreement"); and

(b) Construction agreement with the developer in respect of the same property at RM113,220 ("construction agreement").

11 August 2003: The defendant accepted the offer.

25 August 2003: In order to facilitate the BBA transaction, the plaintiff and the defendant had executed the following agreements:

(a) Property purchase agreement ("PPA") where the defendant sold the property to the plaintiff at RM217,887 ("the purchase price"); and

(b) Sale agreement cum assignment ("SACA") wherein the plaintiff sold the same property back to the defendant at RM434,328.57 ("the selling price"), payable on deferred basis.

(d) The cause of action against the defendant is based on the alleged due selling price. This was evidenced by the issuance of a notice of demand dated 4 October 2006 by the plaintiff's solicitors and the statement of account produced pursuant to cl. 34.1 of SACA.

(e) On 6 March 2007, a judgment in default of appearance (JID) was recorded against the defendant. However, it has been set aside by the learned Senior Assistant Registrar on 6 April 2012 *via* an application by the defendant. Hence, this application.

Arguments By The Defendant

[5] In opposing the application for summary judgment, learned counsel for the defendant, Encik Mohd Hairari bin Samsi, contended that the BBA facility agreements were void under the principle of Islam contract on the following grounds:

(a) the subject matter did not exist at the time of the conclusion of contract. The subject matter in this instant case involved a house-still-pending completion; and

(b) the subject matter was not fit to be used as a security for the facility granted because the defendant had not obtained a full ownership (*milk ghair al-tam*) of the property.

[6] For better appreciation of the point raised, it would be useful if I reproduce here the relevant affirmations made by the defendant in his affidavit in reply:

> (ii) bahawa plaintif akan terlebih dahulu membeli hartanah tersebut daripada saya dengan harga RM217,887 untuk sebuah banglo di atas sebidang tanah yang berkaitan, dan pada ketika berbagai perjanjian antara saya dan plaintif tersebut ditandatangani adalah kenyataan bahawa rumah banglo itu belum siap lagi, dan kedua-dua plaintif dan saya mempercayai ketika itu bahawa rumah banglo itu, hartanah tersebut yang termasuk lot yang telah dipecah sempadan, akan siap;
>
> (iii) selepas rumah banglo itu siap, mengikut berbagai perjanjian antara saya dan plaintif tersebut ianya akan di "immediately reselling the Property to the Customer" dan maksud "the Property" di sini adalah rumah banglo dan tanah di atasnya banglo itu dibuat;

A (iv) bagaimana prinsip Islam dalam berbagai perjanjian antara saya dan plaintif tersebut dapat dilaksanakan kalau rumah banglo dan tanah di atasnya banglo itu dibuat, kedua-duanya tiada disiapkan dan lot tanah rumah banglo itu juga tiada dibuat pecah sempadan atas kegagalan "Vendor/Developer" dan tuan punya tanah ("the Proprietor") melaksanakan tanggungjawab di bawah perjanjian-perjanjian yang berkaitan, yang perjanjian-perjanjian yang berkaitan itu disebutkan dalam berbagai perjanjian antara saya dan plaintif tersebut.

[7] Learned counsel for the defendant further contended that the plaintiff should have ensured that:

(a) the developer had possessed a developer's licence under the Housing Development (Control and Licensing) Act 1966 ("developer's licence");

(b) the developer had subdivided the property, including the issuance of the subsidiary title; and

(c) the BBA Facility had been properly released in accordance with the progress of the construction works.

Arguments By The Plaintiff

[8] In response to the above arguments, learned counsel for the plaintiff has placed great reliance on the Federal Court decision in *Chang Yun Tai & Ors v. HSBC Bank (M) Bhd & Other Appeals* [2011] 7 CLJ 909 and submitted that:

(a) the plaintiff was merely a financing bank and not an advisory bank;

(b) the plaintiff had no duty to ensure that the developer had obtained the developer's licence and/or had applied for subsidiary titles; and

(c) the plaintiff had disbursed the BBA facility amount to the developer in accordance with the terms and conditions of the respective agreements.

Findings Of The Court

[9] I shall now discuss the issues raised by learned counsel for the defendant in turn.

Bai Al-Inah

[10] There is no room for doubt that this instant case concerns a transaction based on *Bai Al-Inah*. Under a typical *Bai Al-Inah* transaction for residential housing, the purchasers are required to execute two agreements: firstly, the Property Purchase Agreement ("PPA") and secondly, the Property Sale Agreement ("PSA"). The first agreement (PPA) provides that the purchasers agree to sell the property, which he purchased from the developer, at the price similar to the price he agrees with the developer to that particular Islamic Bank or Islamic Window Banks ("IWB") and an undertaking that they (the purchasers) are to re-purchase the property from the bank. The second agreement is the property sale agreement. Under this agreement (PSA), the property (which has been vested in the bank) is sold by the bank back to the purchaser, at an increased price. The purchasers are required to repay the bank this price, by way of instalments for a specific duration until the sale price is fully settled. The bank will get profit, being the difference between the price stipulated in the PPA and the price stated in the PSA (the sale price).

[11] It should be noted that the theory and application of *Bai Al-Inah* are still subject to debate by the schools of Islamic law as the sale is said to involve *riba*' (ie, different of prices) or a trick (helah), in sale and purchase activities, by applying *riba*' method of borrowing transaction. (see Dr Wahbah Al-Zuhayli (1988), *Al-Fiqh Al-Islam Wa Adillatuhu (Vol 4), Dimashq, Syria: Dar Al-Fikri)*. The majority of the scholars including Hanafi, Maliki and Hanbali reject *Bai Al-Inah*. The same resolution is adopted by the Shariah Council of Accounting and Auditing Organisation for Islamic Financial Institutions (AAOIFI). However, the minority (such as the Shafie and Zahari Schools) permits it, but the application of *Bai Al-Inah* must be used with circumspection and if only warranted by circumstances. Otherwise, its application should be limited.

[12] The Shariah Advisory Council of Bank Negara Malaysia ("SAC"), upon reference by this court in *Mohd Alias Ibrahim v. RHB Bank Bhd & Anor* [2011] 4 CLJ 654, Suit No: D-22A-74-2010 (the main suit) had issued the following resolutions on *Bai Al-Inah*:

> MPS dalam mesyuarat ke-16 bertarikh 11 November 2000 telah memutuskan bahawa akad *bai 'inah* perlulah memenuhi syarat-syarat berikut:

(i) Kontrak *bai 'inah* perlulah mempunyai dua kontrak yang jelas, iaitu kontrak penjualan dan kontrak penjualan semula;

(ii) Pembayaran harga dalam salah satu urus niaga atau kontrak mestilah dilakukan secara tunai;

(iii) Kedua-dua urusniaga mestilah melibatkan penyerahan hak milik yang sah dari sudut Syarak dan diterima berdasarkan adat perniagaan semasa ('urf tijari');

(iv) Kontrak *bai 'inah* yang dijalankan ini mestilah memenuhi syarat-syarat *bai 'inah* yang diterima oleh Mazhab Syafie;

(v) Penentuan harga dan harta yang terlibat dalam kontrak juga mestilah dengan sebenar dan berdasarkan harga yang munasabah atau berdasarkan pasaran; dan

(vi) Kontrak pertama mestilah diselesaikan terlebih dahulu sebelum memasuki kontrak yang kedua. Ini bertujuan mengelakkan isu penjualan harta yang belum dimiliki oleh pelanggan dalam kontrak kedua.

MPS dalam mesyuarat ke-82 bertarikh 17 Februari 2009 telah memutuskan bahawa akad *bai 'inah* hendaklah menepati syarat-syarat sah seperti yang berikut:

(i) Mempunyai dua kontrak yang jelas dan berasingan, iaitu akad penjualan dan akad penjualan semula;

(ii) Tidak terdapat syarat pembelian semula aset dalam akad;

(iii) Masa bagi pemeteraian setiap akad adalah berbeza;

(iv) Turutan pemeteraian setiap akad adalah betul iaitu akad jual beli pertama hendaklah diselesaikan terlebih dahulu sebelum akad jual beli yang kedua dimeterai; dan

(v) Berlaku pemindahan hak milik aset serta wujud penguasaan ke atas aset (*qabd*) yang sah berdasarkan Syarak dan amalan perniagaan semasa ('*urf tijari*).

MPS dalam mesyuarat yang sama turut memutuskan bahawa pemasukan syarat pembelian semula aset ke dalam akad *bai 'inah* akan menyebabkan akad tersebut menjadi batal.

Sebelum tahun 2009, tiada keputusan oleh MPS yang melarang peletakan syarat pembelian dengan tujuan untuk dijual semula dalam transaksi *bai 'inah*. Di samping itu, terdapat kepelbagaian dalam perbincangan ulamak Mazhab Syafie mengenai *bai 'inah* tanpa menyebutkan secara jelas hukum menzahirkan tujuan membeli atau menjual semula atau sebaliknya. Ini memberikan ruang berlakunya kepelbagaian interpretasi mengenai *bai 'inah* dan syarat-syaratnya menurut Mazhab Syafie.

Pada tahun 2009 (dalam mesyuarat ke-82), MPS telah memutuskan bahawa pemasukan syarat pembelian dengan tujuan untuk dijual semula adalah tidak dibenarkan. Keputusan ini telah diterbitkan pada 26 Oktober 2010. Dari sudut pandangan Syariah, pemakaian sesuatu hukum Syarak yang diputuskan tidak bersifat retrospektif. Ini adalah berdasarkan kepada kaedah umum dalam Syariah, yang menyatakan bahawa sesuatu peraturan atau larangan tidak berkuat kuasa melainkan setelah dimaklumkan kepada umum.

Issue (a)

[13] The general principle of Islamic law relating to contracts involving a non-existent subject-matter is not in dispute. Islamic law lays down the condition that the subject matter (*mahal al-'aqd*) must actually exist at the time of the conclusion of contract. Therefore, if the subject matter is non-existent, the contract is void even though it could probably exist thereafter or even if it is established then that it would exist in the future. The wisdom behind the underlying prohibition of the contract in the non-existing is the fear of *gharar* or risk which may affect the consent which is an import element of the contract (see Al-Kasani, *Badai Al-Sanai*, vol 5, p. 171).

[14] As regard the sale of an asset under construction using BBA and/or *Bai Al-Inah*, Malaysian scholars have permitted it because they perceive it as the sale of rights on the house under construction, not the sale of the physical house under construction. As rights are acknowledged as property in Islam according to majority of scholars, hence the customers can sell the independent financial rights (*haq maliyy*) to the bank. (see Zaharuddin Abd Rahman, *Contracts & The Products of Islamic Banking*, CERT, p. 117).

[15] In *Islamic Financial System: Principles & Operations, ISRA*, the learned author had this to say:

Exhibit 6.4 The Contracted Subject Matter Should be in Existence

According to Hanafi and Shafi'i schools of law, this essential condition applies to both the contracts of exchange and gratuitous contracts (*'uqud al-tabarru'at*) without which the contracts will be deemed void since the Prophet (peace be upon him) forbade the sale of what one does not own. However, they excluded from the hadith several types of sale of the non-existent such as forward sale (*salam*) and manufacturing sale *(istisna')*. This exemption is made on the basis of *istihsan*, consideration of the peoples' needs, their customary practice and the *Shari'ah* acknowledgement of the validity of these contracts. According to Hambali jurists, this is not an essential condition of the subject matter as they argue that

it falls under the Shari'ah prohibition of sale contracts due to ambiguity and uncertainty (*gharar*) such as the sale of the foetus of an animal before its birth (*bay' al-haml fi al-batn*). *In this regard, Ibn Taymiyyah and Ibn Qayyim argued that bay' al-ma'dum is permissible if the non-existent subject matter is certain in its existence such as selling a house under construction or on the map because Shari'ah does not prohibit bay' al-ma'dum but it does prohibit bay' al-gharar which means the sale of what is not capable of delivery whether it is existent or non-existent. They opine that the 'illah of the prohibition of bay' al-ma'dum is not the state of non-existence but the uncertainty in handing over the subject matter to the purchaser which is caused by incapability of delivery. This is in view of the fact that the Shari'ah validates certain types of bay' al-ma'dum such as the sale of fruit after the appearance of their fruitfulness (bay' al-thamar ba'da bad' salahih). Hence, the applicability of this essential condition is clearly associated with the nature (tabi'ah) of the contracts which renders it legal to be effected on a non-existent subject matter.* If the nature of a particular contract necessitates the existence of the subject matter at the time of the conclusion of the contract, then its existence becomes essentially conditional. In this regard, if a non-existent subject matter is contracted, the nature and the legality of this contract has been violated as it contravenes the basic tenets of Shari'ah. This is because Shari'ah has prescribed that his contract can be effected only on existent subject matters to avoid dispute.
(emphasis added)

[16] Premised on the above opinion, the first issue raised by learned counsel for the defendant must fail.

Issue (b)

[17] The court is mindful of the opinion expressed by some commentators that the utilisation of BBA and/or *Bai Al-Inah* as being practised in Malaysia may not be valid on the ground that it may involve the possible occurrence of *gharar al-fahish* elements, particularly in the case of a transaction financing a house pending completion. The issue raised by them is this: whether the purchaser/borrower who had paid a deposit representing 10% of the purchase price when they executed the sale and purchase agreement with the developer and applied for a housing loan from an Islamic bank to finance the balance purchase price had acquired full ownership (*milk al-tam*), warranting him to become the full and absolute legal owner. It was argued that at this juncture, his or her name has yet to be registered as the registered proprietor of the property at the land office. He or she has not obtained any legal ownership to the purported house to warrant him to "sell" the purported house to the Islamic Bank for the

latter to re-sell the house to him (the purchaser/borrower) in accordance with *Bai Al-Inah* principles (see Engku Ali, ERA (2009), *Islamic House Financing: Issues & Solutions. In Prosiding Muzakarah Penasihat Syariah Kewangan Islam* (pp. 21-27), Kuala Lumpur: CEPT Publications Sdn Bhd; Nuarrual Hilal Md. Dahlan and Sharifah Zubaidah Syed Abdul Kader Aljunid, *Shariah and Legal Issues In House Buying in Malaysia: The Legality of Bay, Bithaman-Al-Ajil ("BBA") With Special Reference To Abandoned Housing Projects*, Pertanika J Soc Sci Hum 19(2): 349-361 (2011)).

[18] With respect, this court disagrees. As explained earlier, if the non-existent subject matter is certain in its existence and is capable of delivery in the future, it does not tantamount to *gharar al-fahish*. Concerning full ownership (*milk al-tam*), in *Alias* case *(supra)*, one of the issues referred to the Shariah Advisory Council of Central Bank of Malaysia ("SAC") was:

> Sama ada transaksi *bai bithaman ajil* ("BBA") sah dari segi Syariah apabila hartanah yang terlibat dalam transaksi tersebut dikatakan tidak berpindah milik berdasarkan kepada Carian Hakmilik yang menunjukkan bahawa Gema Padu adalah dan masih merupakan pemilik berdaftar tanah tersebut.

[19] In response to the issue, the SAC in its 123rd meeting resolved as follows:

> Syariah mengiktiraf kesan pemindahan hakmilik akad jual beli yang sah **walaupun tidak berlaku perubahan nama dalam dokumen pendaftar**
>
> (emphasis added)

[20] In other words, Shariah recognises beneficial ownership over a property or an asset.

[21] Thus, the second issue raised by learned counsel for the defendant must also fail.

Duty Of The Plaintiff Towards The Developer

[22] On this issue, the Federal Court in *Chang Yun Tai & Ors v. HSBC Bank (M) Bhd & Other Appeals* [2011] 7 CLJ 909 had made it clear that the bank is merely a financier. Banking business will be rendered impracticable and burdensome if the bank is required to investigate or enquire into a transaction or contract which was entered between its customer and the developer. Since

A the monies were released to the developer at the request of the customers, they remained liable under the financing agreement regardless of the alleged illegality of the sale and purchase agreement.

B **[23]** Thus, the defendant's contention on this issue was clearly unsustainable.

[24] It is pertinent to note that in *Bai Bithaman Ajil Bai-Al-Inah* transaction, PPA and PSA (or SACA when there is no individual title issued) are two separate contracts (see *Bank Islam Malaysia Bhd v. Lim Kok Hoe & Anor And Other Appeals* [2009] 6 CLJ 22). First, the defendant as the beneficial owner sold the property to the plaintiff for a purchase price *via* PPA and the defendant then sold the same property back to the defendant for a selling price *via* SACA. In this case, what is being claimed by the plaintiff is the payment of the selling price plus any other charges which it is entitled to under SACA. Meaning that, the cause of action arises from the SACA and not PPA.

[25] In this instant case, by signing SACA, the court found that the plaintiff had in fact assigned back to the defendant the property and the full and entire benefit of the S&P agreement (see cl. 3.1 of the SACA). The defendant also had agreed not to hold the plaintiff liable for any loss or damages whatsoever incurred by him in the event of any delay in the delivery of vacant possession of the property (see cl. 11.1 of the SACA). This was due to the fact that the defendant had accepted the property was under construction on the date of the execution of SACA. This condition should be given effect thereto.

Conclusion

[26] For the reasons above stated, I held that the issues raised by the defendant were not triable issues which warrant for a full blown trial. I allowed this application with costs fixed at RM2,000.